

**GROUP 3**  
**PHASE 2**

**COMPONENTS AND LEGAL FRAMEWORKS FOR COMBATING  
TRANSNATIONAL ORGANIZED CRIME.  
CRIMINALIZATION OF PARTICIPATION IN ORGANIZED  
CRIMINAL GROUPS/CONSPIRACY; ANTI-MONEY  
LAUNDERING SYSTEM; ASSET FORFEITURE SYSTEM (FOR  
ASSETS DERIVED FROM ORGANIZED CRIMES)**

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**I. INTRODUCTION**

The monumental negative effects of transnational organized crime on the economic, political and social spectrum of nations cannot be over-emphasized. Transnational organized crime undermines the very foundations of world economies. It tends to weaken and destroy governmental machinery and institutions. The sophistry in which members of organized criminal groups perpetuate their nefarious activities certainly has become a great source of concern to governments and law enforcement agencies all over the world. The concerted efforts of various countries within the ambit of the United Nations to curtail the negative consequences of transnational organized crime is indicative of the fact that transnational organized crime poses great danger to peace and tranquility of the world.

The increasing bottlenecks in tackling TOC both on domestic and international levels can be attributed to the complex nature of transnational organized criminal groups. There is a dichotomy between the individual criminal and the organized criminal group. The arrest, prosecution and conviction of a member of any organized criminal group does not necessarily lead to the demise of the group. Organized criminal group are stratified into different levels. Every level requires to play a particular role in the entire criminal enterprise.

Consequently, criminalization of participation in organized criminal groups, developing anti-money laundering system and articulating asset forfeiture system that enables law and enforcement agencies worldwide to deprive criminals of their proceeds becomes imperative.

In this paper, however, attempt will be made to analyze the components and legal frameworks for combating transnational organized crime within context of criminalization of participation in organized criminal group, anti-money laundering system and asset forfeiture system (for assets derived from organized crimes).

## II. CRIMINALIZATION OF PARTICIPATION IN ORGANIZED CRIMINAL GROUPS/CONSPIRACY

### A. Draft UN Convention Proposal

Previous efforts notwithstanding, the tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, Austria, 10-17 April, 2000 set in motion instrument "to align national laws in criminalizing acts committed by organized criminal groups". The Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime came out with a draft UN Convention against TOC, in July, 2000. The draft Convention proposes to criminalize participation and conspiracy in regard to organized criminal groups. Article 5 seeks to criminalize such activities as agreeing to commit a serious crime, participation in criminal activities of organized criminal group, and organizing, directing etc. the commission of serious crimes.

### B. Criminalization of Participation

Experience in various countries has shown that the existing penal provisions are not sufficient to deal with serious crimes perpetrated by members of organized criminal groups which came into existence in such countries. Provisions were therefore made in the penal laws to include criminalization of participation by such criminal activities as organizing, directing, facilitating, counseling commission of serious crimes or taking part

in the criminal and certain other activities of the organized criminal group as a specific criminal offence.

One of such countries is Italy which incorporated these provisions in its laws. In a wider perspective, the Italian law characterizes participation in an organized criminal group into four types, namely;

- (i) association for purposes of committing offences (simple organized crime or conspiracy - article 416 penal code),
- (ii) association for the purposes of terrorism or subversion (subversive organized crime - article 270 - bis penal code),
- (iii) Mafia - type association (Mafia - type organized crime - article 416 bis penal code); and
- (iv) association for the purposes of illicit trafficking of narcotic or psychotropic substances - (Article 74 of Presidential Decree No. 309/1990).

The difference between membership of Mafia-type organization and the other three associations is that while the latter only require the creation of a stable organization for the purposes of committing indeterminate number of offences, membership of Mafia-type organization additionally require the organizations to have acquired genuine capacity for intimidation in their area. The members of the organizations must also exploit this power to coerce third party with whom the organizations enter into relations and oblige them to enter into a conspiracy of silence (Mafia method).

In China, the Criminal Law was amended in 1997. Article 294 stipulates that anyone who organizes, leads and actively joins any organization having characteristics of underworld society which by violation, menace or other methods

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commits crimes organizationally, domineers in locality, makes hostile attacks, forces and harms masses cruelly, and infringes gravely upon economic and social order, will be punishable with imprisonment of 3 to 10 years.

In Japan, however, law regarding participation in an organized criminal group has not found favour with the authorities as it may not be compatible with the constitutional provision of freedom of association. To this end, if a common provision were to be introduced regarding definition of organized criminal group, it may perhaps pose a great difficult to include certain organization while keeping others out of its purview. There has been noticeable strong feeling among certain sections of the Japanese society against introducing an omnibus legislation criminalizing participation in an organization. In view of such obvious technical issues and perceived opposition, it has become a herculean task to arrive at a definite conclusion for criminalization of participation in organized criminal groups in Japan.

In India, the existing laws were found sufficient to deal with organized crime, but with the organized groups forming a Mafia type of organization, sometimes operating from foreign countries, the laws have been found wanting in many respects. The offence of criminal conspiracy which could cover all the conspiring members could no longer cover the top echelons of the organized criminal groups who sometimes were not taking part in day-to-day criminal conspiracies to commit offences. However, they were running the criminal empire from a distant position and were the kingpins of all criminal activities of the group. With such inadequacies in view, the state Government of Maharashtra enacted Maharashtra Control of Organized Crime Act in 1999. A central Act is however

needed to deal with this problem in other parts of India, and therefore, the Government is already engaged in making a draft legislation to be introduced in the Parliament.

### **C. Conspiracy**

Article 5(1)(a)(i) of the draft UN Convention proposes that agreeing with one or more persons to commit a serious crime should be a penal offence. A similar provision already exists in many countries like Fiji, India, Indonesia, Laos, Malaysia, Nigeria, Pakistan, Papua New Guinea, Philippines, Tanzania, Thailand and Uganda where conspiracy is a distinct offence. The offence of conspiracy generally states that when two or more persons agree to do, or cause to be done an illegal act, the act is designated as a criminal conspiracy.

In Japan, the penal code, Chapter XI, Articles 60 - 65 deal extensively with complicity among co-principals, instigators, and accessories. However, a mere agreement to commit a crime is not an offence except in some cases like insurrection. The United States Code (Annotated) Title 18, Chapter 19 categorizes conspiracy into three sections. Section 371 deals with conspiracy to commit offence or to defraud United States; section 372 deals with conspiracy to impede or injure officer; and section 373, solicitation to commit a crime of violence.

### **D. Recommendation**

From the foregoing, undoubtedly, many countries do not criminalize participation in organized criminal group or the laws are not all embracing. In some countries, the scope of the offence of conspiracy is limited. There may be necessity in some countries like Japan (for groups such as Boryokudan) to expand the concepts of complicity or conspiracy to agreeing with others to commit serious offences. There is apparent need in accordance with draft UN

Convention to criminalize participation in organized criminal group, both in the activities of the group as well as in agreeing to commit serious crime. If such provision is not incorporated, it may be possible for an offender accused of participation in an organized criminal group to find refuge in a country where there is no such law and in that event, his extradition may not be possible as the requirement of dual criminality will not be fulfilled. The draft convention is all encompassing, gives guidelines and the concrete basis on which states can enact comprehensive domestic laws for criminalization of participation in organized criminal group. Once the draft convention becomes applicable it would provide a bold legal framework in combating organized crime. While ratifying the convention, States may do well to provide a concise definition of the organized criminal group and make a criminal offence of participation in an organized criminal group, at the same time, ensuring that both the types of conduct are punishable, i.e. participation (as in Italy) and conspiracy (as in common law countries).

### III. ANTI MONEY-LAUNDERING SYSTEMS

Money laundering has a direct linkage to crimes that are organized in character, scope and content. According to the definition adopted by the international criminal police organization (ICPO/INTERPOL), "*money laundering denotes any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources*".

Money laundering typifies a deliberate, complicated and sophisticated process by which the proceeds of crime are camouflaged, disguised or made to appear as if they were earned by legitimate means.

Money laundering can be categorized into a three-stage process. Firstly, severing any direct link between the money and the predicate crime generating it, secondly, obscuring the money trail to foil pursuit, and thirdly, re-investing the crime proceeds in furtherance to commit more crimes.

The major thrust of Vienna Declaration on Crime and Justice: Meeting the Challengers of the Twenty-first Century and the Naples Political Declaration and Global Action Plan against Transnational Crime was to initiate procedure to develop legal framework for Anti money-laundering system. The draft UN Convention against transnational organized crime, Articles 6 and 7 aptly provide for criminalization of the laundering of proceeds of crime and measures to combat money-laundering respectively. Considering the draft UN Convention as an index to articulate comprehensive legal framework for combating money laundering, indeed, many countries run short of the draft Convention expectations .

Japan has legislation against money laundering though reported cases of money laundering are relatively low. In 1992, Law Concerning Special Provisions for the Narcotics and Psychotropic Control Law etc. and other Matters for the Prevention of Activities Involving Controlled Substances through International Cooperation, commonly known as "Narcotics Special Provision Law", was enacted. Under this special law there are provisions against concealment of crime proceeds, receipt of crime proceeds and presumption of illicit proceeds.

In the same direction, in 1999, Law for Punishment of Organized Crimes, Control of Crime Proceeds and other matters, commonly known as "Organized Crime Punishment Law", was enacted. This law is designed to enable Japan to effectively

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cope with transnational organized crime. Chapter V, Articles 54 - 58 of this law provide for report of suspicious transactions.

In Italy, the legal instruments to deal with money laundering are embodied in Article 648 bis and 648 ter of the Penal Code, let alone Article 12 quinquies of Decree-Law n.306/1992 (fraudulent transfer of valuables). Article 648 bis stipulates, "Except in cases of participation in the (predicate) offence, any person substituting or transferring money, goods or assets obtained by means of intentional criminal offences, or any person seeking to conceal the fact that the said money, goods or assets or the proceeds of such offences shall be liable to imprisonment of 4 - 12 years and to a fine of Lit 2 to Lit 30 million". Article 648 ter punish, with the same penalty, the use of money, goods or assets of unlawful origin for economic or financial activities, In accordance with EU directives, Italy enacted Law N0.197/91 and made subsequent modifications regulating the mechanism of the report of suspicious transactions to Italian Exchange Bureau. Suspicious Transactions Service was also established in Italy's National Anti-Mafia Bureau. This system, of banks and other financial institutions reporting suspicious transactions is an essential ingredient to control and detect laundered money.

Pakistan enacted The Control of Narcotic Substances Act in 1997. This Act has substantial provisions to deal with illegal proceeds derived from drug trafficking. The National Accountability Bureau Ordinance 1999, coupled with other administrative regulations, has a comprehensive scheme against illegal proceeds derived from other crimes. In neighbouring India, law on money laundering is in a draft stage.

In the wake of an upsurge of drug trafficking and other related offences in Nigeria, the government promulgated Money Laundering Decree 1995, Section 14 of which provides :

*"A person who:*

- (a) converts or transfers resources or property derived directly or indirectly from illicit trafficking in narcotic drugs or psychotropic substances, with the aim of either concealing or disguising the illicit origin of the resources or property; or aiding any person involved in the illicit traffic of narcotic drugs or psychotropic substances to evade the legal consequences of his action or;*
- (b) collaborates in concealing or disguising the genuine nature, origin, location, disposition, movement or ownership of the resources, property...*
- (c) is guilty of an offence..."*

Added to the promulgation of money laundering decree, there was establishment of Money Laundering Surveillance Unit in Central Bank of Nigeria.

In an effort to stem money laundering, Brazil in 1998 enacted law for combating money laundering. This law was followed by the establishment of Council of Financial Activities (COAF), a Council that is responsible for identifying illicit activities related to money laundering.

In China, Article 191 of the Criminal Law deals with money laundering which stipulates that whoever knowing clearly that illegally gotten wealth and its profits are coming from drug crimes, or organized crimes, smuggling, in order to hide and conceal its origin and nature by various methods will be sentenced up to 5 years imprisonment and deprived of all ill-gotten wealth and its profits.

Thailand enacted the Money Laundering Control Act in 1999 as the existing laws were not able to cope with the problems. Therefore, Money Laundering Control Board was established to deal with the money laundering problems, and Transaction Committee was set up to examine and audit transactions and properties related to criminal or predicate offences. The law requires financial institutions to report the excessive cash deposits, the over valued properties and suspicious transactions as stipulated by Ministerial Regulations.

While Tanzania and Uganda have not developed any substantive anti money laundering legal frameworks, they have formed National Anti Money laundering Committees in line with principles of the East and Southern Africa Anti Money Laundering Group (EASAALMLG). In Philippines, there is no specific legislation criminalizing money laundering and the anti money laundering regulations have been found wanting especially in respect of such basic features as customer identification, record keeping and excessive bank secrecy provisions.

In its annual report for 1999-2000, FATF estimated that revenue generated from narcotics trafficking in the USA alone ranged from US\$ 40 billion to US\$ 100 billion. However, under United States money laundering laws, it is a crime to knowingly conduct a financial transaction with the proceeds of certain specified unlawful activity set forth in the statute with either the intent to promote or to conceal the specified unlawful activity.

#### **A. Recommendations**

Money laundering is an integral part of organized crime. Evidently, there are still yawning gaps in legal frameworks of many countries to effectively tackle this problem. The draft UN Convention seeks to include

in the predicate offences, offences described in Article 6 (criminalisation of money laundering), Article 8 (criminalization of corruption), Article 23 (criminalization of obstruction of justice) and a comprehensive range of offences associated with organized criminal groups. There are certain countries whose bank secrecy laws make it attractive to deposit money without easy identification while there are others whose procedures do not effectively deter opening of fictitious bank accounts. There are a number of countries whose company laws make it easy to register offshore companies on payment of a small fee with the result that there is no proper auditing of financial accounts. Such facilities tend to promote money laundering. In this respect, the draft UN convention recommends adequate record keeping and reporting of suspicious transactions which may require a basic change in the policy regarding banks, non-banking financial companies, and company registration and accounts. Furthermore, a Financial Intelligence Unit is proposed to be established in member countries to collect, analyze and disseminate information about potential money laundering.

As long as the difference between the countries with strict anti money laundering systems and with the lax ones remains, it is not possible to have an effective global anti money laundering programme. In other words, the difference in the rules of the strict and lax countries contribute to the transnational criminal organizations to exploit the diversities to frustrate international efforts against money laundering. It therefore becomes imperative for all member countries to incorporate the draft UN Convention into their domestic laws. In addition to such incorporation, it may be necessary for all member countries to adopt a more strict attitude against money laundering.

#### **IV. ASSET FORFEITURE SYSTEM**

The overriding objective of members of organized criminal groups is to acquire enormous economic power and amass wealth in area of property acquisition and huge bank accounts. Organized criminal groups have consistently developed new techniques to conceal substantial crime proceeds from the jurisdiction where such illicit wealth was generated. Asset forfeiture system is a veritable tool for law enforcement and judicial criminal process to deprive criminals of illegally acquired proceeds, and plough back such proceeds to the community for the greater good of the society.

The draft United Nations Convention against Transnational Organized Crime, Article 12, provides legal framework to weaken financial empire of transnational organized groups. This article deals with confiscation and seizure. Article 13 lays down the framework for international cooperation for purposes of confiscation. Article 14 enumerates the methodology and procedure for disposal of confiscated proceeds of crime or property. The central idea of Articles 12-14 is generally to make transnational organized crime unattractive and unproductive.

The legal provisions regarding asset forfeiture system differ from country to country. In countries like Nigeria, Tanzania and Uganda, there are no discernible laws relating to asset forfeiture. However, in Nigeria, Advance Fee Fraud and other related offences Decree and the Money Laundering Decree have provisions that allow for seizure and confiscation of proceeds of crime but with limited scope. Similarly, in Malaysia, Dangerous Drugs (forfeiture of property) Act was enacted in 1988 for forfeiture of assets.

In Indonesia, Part Four (Articles 38-46) of the Code of Criminal Procedure provides for confiscation of proceeds of crime. Such goods (proceeds of crime) in confiscation because of a civil case or bankruptcy can also be confiscated in the interest of the investigation, prosecution and trial of a criminal case. In Laos, Article 32 of Penal Code provides for seizure and confiscation of properties. Seizure of properties may be sentenced only in case of serious cases mentioned in the Penal Code.

The legal framework for asset forfeiture, confiscation, attachment or seizure in India is contained in Criminal law Amendment Ordinance (1944), sections 111 and 112 of Customs Act (1964), Smugglers and Foreign Exchange Manipulators (forfeiture of property) Act (1976), chapter V-A (sections 68A-68Y) of Narcotic Drugs and Psychotropic substances Act (1985) and sections 102 and 452 of Criminal Procedure Code.

While Brazil does not have an asset forfeiture system specific to the cases of organized crime, Pakistan Criminal Procedure Code provides for seizure by police and forfeiture by court of illegal proceeds of crimes. Sections 516A and 517 fully empower the courts to dispose of property used or resulting from a crime. Similarly, Custom Act, 1969 provides for seizure and confiscation of illegal goods. The Narcotics Control Substances Act, 1997 and NAB Ordinance, 1999 fulfill the requirements of UN Convention 1988 and UN Convention on TOC.

In China, Section 8, Article 59 of the Criminal Law provides for confiscation of proceeds of crime partially or totally. If proceeds are to be totally confiscated, provision should be made leaving enough amount for meeting the daily expenditure to sustain the family life. In Thailand, there is provision for forfeiture under the

Money Laundering Control Act, 1999.

The Japanese asset forfeiture system for organized crime is embedded in Organized Crime Punishment Law, 1999. In this law, the system of securance of confiscation and securance of collection of equivalent value is provided, which is helpful for asset forfeiture system. There is also provision for asset forfeiture in drug related offences in Narcotics Special Provision Law, 1992. In this law, there is presumption of illicit proceed relation to property obtained by the parties during engagement in drug related offences, if the value is deemed unreasonably large and such property or equivalent thereof is liable to be confiscated.

The United States has two forfeiture systems in operation, the civil and the criminal forfeiture system. The basic distinction between criminal and civil forfeiture is that criminal forfeiture is limited to a convicted defendant's personal interest in property subject to forfeiture, whereas civil forfeiture focuses on the property itself. A criminal, upon conviction, may be ordered to forfeit all profits or proceeds derived from criminal activity or any property, real or personal, involved in the offence, or property traceable to the offence such as property acquired with proceeds of criminal activity.

In Hong Kong, Section 8 of the Confiscation Order permits the High court or District court where a person has been convicted of a specified offence defined under this ordinance including both schedule 1 and 2 offence, to make a confiscation order in relation to the person's proceeds of that specified offence.

The Italian Penal Code, Article 416 bis co.7, prescribes that "In the event of conviction, articles which were used or intended to be used to commit the offence

and the proceeds thereof shall be forfeited". Furthermore, Law No. 356 of 1992 provides for compulsory forfeiture of properties owned by convicts on charges of Mafia crimes, which turn out disproportionate in comparison with the legal income of the owner; and Law No. 646 of 1982 provides for compulsory forfeiture of goods of persons suspected to belong to Mafia type organization which are disproportionate to the legal income. According to the Italian jurisprudence, there is a sharing of the burden of proof in respect of the assets which, being disproportionate in comparison with the legal income, are liable to be confiscated. In such cases, the prosecution has to first prove that the assets are effectively owned directly or indirectly by the suspect (who usually use figureheads or strawmen), and then that the assets are disproportionate to the income of the suspect. The suspect thereafter must prove the lawful origin of the assets.

#### **A. Recommendations**

The draft UN Convention proposes that the offender has to demonstrate the lawful origin of the alleged proceeds of crime or other properties liable to confiscation if permissible as per the domestic laws. However, there is no provision like the Italian one whereby disproportionate assets could be forfeited. It therefore may be desirable to incorporate such provisions if permissible as per the domestic laws of various countries.

There is need for international cooperation in freezing, seizure, forfeiture and confiscation of proceeds of crime. When the proceeds of crime are derived in one country but moved to other countries with different laws, difficulties are faced by the authorities in securing them for the purpose of judicial and other proceedings. Letters of request are usually sent to the foreign authorities to make the proceeds

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of crime available. In cases where the suspect is convicted, the trial judge may have to order confiscation to return the proceeds of crime to the victim. In this respect, it is necessary that bilateral or multilateral agreements should be entered into by various countries to facilitate easy transfer of such proceeds to the requesting country. However, in certain situations, it may become expedient to share assets on case-to-case basis, especially in offences where there is no rightful owner of the proceeds, such as proceeds out of drug trafficking from one country to another. There should be provision in the mutual assistance agreements in this regard.

In order to accomplish the objective of the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the asset forfeiture systems of signatory countries have to be more comprehensive.

#### **V. CONCLUSION**

In conclusion, against the backdrop of globalization of crime, the most appropriate measure to check the negative trend of transnational organized crime with its attendant characteristics is for nations to borrow a leaf from the draft UN Convention against organized crime by criminalizing participation in organized criminal groups, criminalization of the laundering of the proceeds of crime and ensuring that proceeds of crime are forfeited on domestic and international levels. The Convention provides a framework which can be utilized by the member countries to enact or amend their own laws keeping sanctity of constitutional, legal and social structure in mind. Such laws will work as a common thread running through diverse legal systems paving way for smooth international cooperation. It may, however, be naive to expect that transnational criminal organizations will surrender to

this UN sponsored global action against them. The international community will have to mobilize far more effective countermeasures to fight the battle against transnational organized criminal groups. The success, however, will greatly hinge upon the overall capacity of various nations to remain united, rising above minor differences that might crop up while initiating and executing requests for legal assistance. Given the world wide support extended to the UN efforts so far, nations can hope to provide their citizens a more safe and secure world in the twenty first century.